Filed 4/6/04 Ash v. Ash CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TRUDE LEE ASH and COMERICA BANK-CALIFORNIA, Objectors and Respondents, v. HIRAM ASH, Objector and Appellant.	B131155 (Los Angeles County Super. Ct. No. BP048688)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roy L. Norman, Judge. Affirmed.

Robert Guevara and Hiram Ash, in propria persona, for Objector and Appellant.

Greenberg, Glusker, Fields, Claman, Machtinger & Kinsella, Michael A. Greene and Gregory P. Korn for Objector and Respondent Trude Lee Ash.

Westover & Westover and Harry E. Westover for Objector and Respondent Comerica Bank-California.

BACKGROUND

In 1989, Joseph and Trude Ash created a revocable living trust ("the trust").[1] The trust recites that Joseph and Trude are the initial trustees, as well as the lifetime beneficiaries, and that their children and grandchildren are the contingent beneficiaries. The trust identifies the couple's four adult children as three daughters, Yona Fleck, Shereen Gonzales (McDade), and Jennice Bourdase, and one son, appellant Hiram Ash.[2] The couple's assets were to be transferred to the trust, and unless otherwise specified, were to be presumed to be community property.

On February 25, 1998, Trude executed a document entitled, "Declaration of Revocation of Revocable Trust dated August 17, 1989," and delivered it to the attorneys for both settlors of the trust (Trude and Joseph), and to the attorneys for the trustees. At that time Comerica Bank was a co-trustee of the trust and acknowledged receipt of Trude's revocation. On May 27, 1998, Comerica was appointed conservator of the estate of Joseph, who had suffered a disabling stroke a few years before.

Shereen brought an application to set aside the revocation, in which appellant joined. An evidentiary hearing was conducted over two days in

---

[1] Appellant represents that the record in this appeal does not contain a complete copy of the trust and asks that we take judicial notice of the record in Case No. B141349 (consolidated with No. B130513), a related appeal in which we filed an opinion on January 29, 2004. We grant appellant's request and summarize from that copy of the trust instrument.

[2] Since many of the parties share a surname, and some of adult daughters underwent name changes during the course of the proceedings, we shall refer to all of the Ash family by their first names, to avoid confusion. When we refer simply to "respondent," we are referring only to respondent Trude Ash. Comerica joined in Trude's brief, and did not file a separate respondent's brief.

September 1998, and the trial court issued a statement of decision on October 15, 1998. Joseph's conservator appeared and participated in the hearing, but did not object to the revocation.[3]

The court found that Shareen and appellant were contingent beneficiaries under the trust and therefore had no standing with respect to the internal affairs of the trust or its creation or revocation. Nevertheless, the court went on to find that the revocation had been executed and delivered in accordance with the provisions of the trust, that the trust unambiguously provides for the unilateral revocation by one settlor acting alone and without the consent or signature of the other, and that no sufficient evidence was introduced to show a contrary intent on the part of the settlors. The trial court concluded that the trust was effectively revoked on February 27, 1998. The court also found that the assets of the trust were community property, and that Trude did not waive her rights under Family Code section 761.[4]

Appellant filed objections to the statement of decision, and later a motion for new trial, which the court treated as a motion for reconsideration. On April 2, 1999, the trial court overruled appellant's objections, denied the motion for reconsideration, and ordered that the statement of decision be deemed its order. Appellant then filed a timely notice of appeal.[5]

---

[3] In his reply brief, appellant claims that the conservator did not appear, but he does not support his assertion with a reference to the record. The reporter's transcript shows an appearance by Comerica.

[4] Family Code section 761 is discussed within.

[5] We have relied on the trial court's statement of decision for much of our summary of the background facts. The remainder is taken from our own review of the record, and

DISCUSSION

Appellant contends that our review must be a de novo one, because it involves an interpretation of statutes and written instruments. Appellant relies in part on *Dawson v. East Side Union High School Dist*. (1994) 28 Cal.App.4th 998, 1040, and he refers to page 1041, where the court observed: "The Supreme Court has gone so far as to state that '[w]hether a permanent injunction should issue becomes a question of law where the ultimate facts are undisputed and in such a case the appellate court may determine the issue without regard to the conclusion of the trial court. [Citations.]' [Citation.]" (*Ibid*., quoting *Eastern Columbia, Inc. v. Waldman* (1947) 30 Cal.2d 268, 273.) Since the instant appeal is not an injunction case, we assume that appellant's reliance upon the cited authority is meant to imply that there is no conflict in the facts, and that he does not challenge the sufficiency of the evidence.

We agree that absent a conflict in the relevant extrinsic evidence, interpretation of the trust instrument is a question of law which we consider de novo. (*Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439.) Further, since appellant does not contend that the statement of decision has omitted any material facts, or that any of its findings are ambiguous, and he does not contend that it contains deficiencies that he brought to the attention of the trial court, we accept all of the trial court's express findings of fact, as well as any implied findings

---

does not include the many facts and assertions in appellant's briefs that are unsupported by any citation to the record. (See Cal. Rules of Court, rule 14(a)(1)(C); *Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481, fn. 1; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.) And we have disregarded the many matters discussed in the opening brief that were not shown to have been before the trial court. (See *Doers v. Golden Gate Bridge etc. Dist*. (1979) 23 Cal.3d 180, 184-185, fn. 1.)

necessary to support the judgment. (See *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134; *Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1229-1230; Code Civ. Proc., § 634; cf., *Sanctity of Human Life Network v. California Highway Patrol* (2003) 105 Cal.App.4th 858, 863.) And we assume that substantial evidence supports the order, since appellant appears to have conceded that issue.

On the first page of his opening brief, appellant announces that "recent events have made this appeal improper," because it is *both* moot and not yet ripe. Appellant explains: "Joseph's death apparently vested the trust (which was still in effect at his death). This has resulted in new declaratory litigation to determine this (and possibly moot the judgment from which this appeal is taken). Respondents have resisted [appellant's] federal action on grounds of lack of jurisdiction; if they are successful, it will be filed in state court. But until that issue is resolved, this appeal is not ripe and an impediment." Appellant goes on to assert that this appeal should be stayed while he litigates his contention that the trust became "vested" upon Joseph's death, which he represents to have occurred sometime after March 29, 2001. Because appellant has raised the issue, we must address it.

Appellant's reasoning is flawed. The trust provides that appellant is a contingent beneficiary and gives him no rights in the trust assets until after the deaths of *both* settlors. Because Trude is still alive, the terms of the trust preclude it from vesting in favor of appellant.

In a corollary argument, appellant suggests that this appeal stayed the effect of the revocation. Appellant concludes that Trude could not, therefore, revoke the trust with regard to Joseph's *share* in the community property. As authority for his circular reasoning, appellant relies upon the general rule that an appeal operates to stay enforcement of the order from which the appeal is taken. (See e.g., *Estate of*

Neilson (1960) 181 Cal.App.2d 769, 773; Code Civ. Proc. § 916; Prob. Code, § 1310.) But the order which is the subject of this appeal, and which we affirm, found that the trust had been validly revoked by Trude. It denied the affirmative relief sought by appellant and his sister to set aside the revocation. Thus, even assuming some type of stay was effected upon the notice of appeal, affirmance of the order establishes that the trust was effectively revoked on February 27, 1998, prior to Joseph's death.

Appellant contends that the trial court erred in finding that he had no standing to object to Trude's revocation of the trust. Respondents reassert lack of standing as an additional ground for affirming the order. Lack of standing may be raised at any time, and may even be raised for the first time on appeal. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 619.) In our prior opinion filed on January 29, 2004, in consolidated cases Nos. B130513 and B141349, which we will refer to as *Ash II*, we addressed appellant's standing in connection with an action brought by Trude against the trustee to recover funds which Trude contended the trustee had dissipated. There, we concluded that appellant lacked standing to appear in the action because he was only a contingent beneficiary. The same reasoning applies here and we see no reason to change our opinion in connection with this appeal.

But even if we were to agree that appellant had standing to challenge revocation of the trust, it remains appellant's burden to show that the claimed error of the trial court in failing to recognize appellant's standing has resulted in a miscarriage of justice. (*Cucinella v. Weston Biscuit Co*. (1954) 42 Cal.2d 71, 83; Cal. Const., art. VI, § 13.) The trial court did not dismiss the application. Instead, it held a two-day evidentiary hearing, allowed appellant to participate, and ruled on the substantive issue of revocation. Thus, appellant has not shown any prejudice

from the ruling. (See *In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.)

Appellant also argues we should recognize his standing to contest revocation of the trust because Joseph's conservator resigned due to a conflict of interest, and if appellant is not permitted to intervene, he reasons, there is no one to protect Joseph's interests. Appellant cites no authority for his suggestion.

Probate Code section 3057 allows third parties to intervene to protect an incompetent spouse under some circumstances. It provides: "Where a spouse lacks legal capacity and *does not have a conservator*, any interested person who has knowledge or reason to believe that the rights of such spouse in the community property are being prejudiced may bring an action on behalf of such spouse to enforce the [fiduciary] duty imposed by Sections 721 and 1100 of the Family Code with respect to the management and control of the community property and to obtain such relief as may be appropriate." (Italics added.)

Appellant does not say when the resignation took place, and fails to refer to the reporter's transcript for evidence to support his argument that Joseph did not have a conservator at the time of the revocation hearing. In fact, the record establishes that Joseph's conservator appeared and participated in the hearing, and the trial court found that it did not object to the revocation.

As an apparent fallback argument, appellant asserts that the conservator's position as both trustee and conservator created a conflict of interest that resulted in Joseph's having no real or legitimate representation at the hearing. Although appellant provides no authority to support his assertion, we shall assume for the moment, and only for the purposes of discussion, that he is correct, and that the conservator's alleged conflict of interest gives appellant standing under Probate Code section 3057 to enforce Trude's fiduciary duties in the management of the

community property. It is still necessary that the revocation must be shown to have been a breach of those duties.

"Subject to Section 3071, the right of a spouse to manage and control community property, including the right to dispose of community property, is not affected by the lack or alleged lack of legal capacity of the other spouse." (Prob. Code, § 3051, subd. (a).) If a conservator is appointed for the spouse who lacks legal capacity, community property does not become part of the conservatorship estate, unless the spouse with legal capacity so consents. (Prob. Code, § 3051, subds. (b)(2), (c).) Where the spouse who has legal capacity has not so consented, he or she retains "the exclusive management and control of the community property including, subject to Section 3071, *the exclusive power to dispose of the community property*." (Prob. Code, § 3051, subd. (b)(1), italics added.)[6]

Under Probate Code section 3071, the spouse with legal capacity need not obtain the consent or joinder of the other spouse's conservator in any transaction involving community property, unless the joinder or consent of both spouses is required by section 1100 or 1102 of the Family Code or by any other statute. Under Family Code sections 1100 and 1102, *either* spouse has the management and control of the community personal and real property, except as provided in Family Code sections 761 and 1103.

Family Code section 761, subdivision (b) provides for the revocation of a trust containing community property, as follows: "Unless the trust instrument

---

[6] Appellant questions Trude's competence to revoke the trust, and complains that the trial court refused to allow him to question her on that issue. But he does not develop this argument or cite any authority. "It is the duty of counsel by argument and the citation of authorities to show that the claimed error exists. 'Contentions supported neither by argument nor by citation of authority are deemed to be without foundation, and to have been abandoned.' [Citation.]" (*Estate of Randall* (1924) 194 Cal. 725, 728-729.)

expressly provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone. Community property, including any income or appreciation, that is distributed or withdrawn from a trust by revocation, power of withdrawal, or otherwise, remains community property unless there is a valid transmutation of the property at the time of distribution or withdrawal."

Family Code section 1103, subdivision (a), provides: "Where one or both of the spouses either has a conservator of the estate or lacks legal capacity to manage and control community property, the procedure for management and control (which includes disposition) of the community property is that prescribed in Part 6 (commencing with Section 3000) of Division 4 of the Probate Code." Thus, we come full circle back to Probate Code section 3051, which gives the spouse with legal capacity "the exclusive management and control of the community property including, subject to Section 3071, *the exclusive power to dispose of the community property*." (Prob. Code, § 3051, subd. (b)(1), italics added.) And we circle back to Probate Code section 3057, under which any right appellant might have to challenge Trude's management and control exists only to enforce any fiduciary duties owed to Joseph.

Appellant contends that Trude's revocation of the trust was a breach of her fiduciary duty, because she unduly profited from it, and because she exerted undue influence over Joseph. But he provides no citation to the record, and does not summarize evidence that might show such undue influence or profit; nor does he provide any authority to support the suggestion in his argument that a spouse gains an undue profit simply by managing and controlling community property in a

manner permitted by law.[7] "[L]egal issues arise out of facts, and a party cannot ignore the facts in order to raise an academic legal argument." (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291.) Appellant's failure to provide citations to the established evidence and to authority effects a waiver of this issue. (*Estate of Randall*, *supra*, 194 Cal. at pp. 728-729.)

"'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Further, "a reviewing court begins with the presumption the record contains evidence sufficient to support the judgment, and it is an appellant's burden to demonstrate there is no substantial evidence to support the judgment. [Citations.]" (*Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1510.) "If any matters could have been presented to the court below which would have supported its findings and judgment, it will be presumed that such matters were presented. [Citation.]" (*Construction Financial v. Perlite Plastering Co.* (1997) 53 Cal.App.4th 170, 179.)

Appellant has failed to meet his burden. Without providing applicable authority or referring to evidence, appellant argues, "[W]e know of no circumstances where one can unilaterally revoke the joint trust, after the spouse becomes incompetent." We have just outlined those circumstances: under Family Code section 761, subdivision (b), and Probate Code sections 3051 and 3071, a revocable living trust, the assets of which are community property like the trust at

---

[7] Appellant does not suggest, for example, that Trude transferred the trust assets to herself as separate property. (See e.g., *In re Marriage of Delaney* (2003) 111 Cal.App.4th 991.)

issue here, may be unilaterally revoked by the spouse with legal capacity, even where the other spouse is legally incompetent, so long as the trust instrument does not expressly provide otherwise.

The trust instrument does not provide otherwise. Not only does it not provide otherwise, it expressly provides for unilateral revocation at any time while both spouses live. Paragraph 9.01 states in relevant part: "As long as we are both alive, we may . . . revoke this trust. . . . Revocations must be signed by *either or both of us* and delivered to the Attorney for the Trust during our joint lifetime." (Italics added.)

Further, Paragraph 1.06 of the trust instrument expressly makes it revocable by either Trude or Joseph while they were both serving as trustees, *subject to their respective rights under community-property law*. Since the trust did not provide otherwise, and since its assets were composed entirely of community property, community-property law gave Trude the power to revoke the trust, acting alone. (Fam. Code, § 761, subd. (b).) And that power extended to all community property in the trust, not just her share. (*Estate of Powell*, *supra*, 83 Cal.App.4th at p. 1440.)

Since Trude did exactly what the law and the trust instrument permitted her to do, even if we were to conclude appellant had standing under Probate Code section 3057 to challenge the ruling, the trial court's ruling that the trust was effectively revoked on February 27, 1998, must be affirmed.

For the first time in his reply brief appellant raises claims under the Elder Abuse And Dependent Adult Civil Protection Act, Welfare and Institutions Code section 15610, et seq. Because these claims are raised for the first time in the reply brief, we deem them waived. (*Hibernia Sav. and Loan Soc. v. Farnham* (1908) 153 Cal. 578, 584.) Further, the claims must first have been made in

Superior Court and appellant has failed to demonstrate that he did so. (Welf. & Inst. Code, § 15657.3.)

DISPOSITION

The order finding that the trust was revoked effective February 27, 1998, and denying affirmative relief to appellant and his sister is affirmed. Respondent Trude Ash shall have her costs on appeal.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.